Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1976 76-1216

ANN HERNANDEZ,
Petitioner

DONALD DYE, et al,
Respondent

PETITION FOR WRIT OF CERTIORARI IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT, DIVISION FOUR

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CODES

Calif. Education Code §13583 .....3, 4, 6, 9, 14, 15
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TEXT

Administrative Law; Bernard Schwartz and Edwin D. Webb, Little, Broan and Co.; Boston, Toronto; 1976; p. 271, 272 11

In the Supreme Court of the United States

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PETITION FOR WRIT OF CERTIORARI
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FIRST APPELLATE DISTRICT, DIVISION FOUR

PETITION FOR WRIT OF CERTIORARI

In the Supreme Court of the United States to The Honorable Warren Burger, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Ann Hernandez, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above entitled case on November 12, 1976.

OPINIONS BELOW

The unreported opinion of the Court of Appeal of the State of California, First Appellate District,

Division Four is appended hereto as Exhibit "A." The Order Denying Petition for Hearing in the Supreme Court of the State of California, dated November 12, 1976, is appended hereto as Exhibit "B."

JURISDICTION

The Supreme Court of the State of California failed to grant petitioner a hearing after the Court of Appeal of the State of California, First Appellate District, Division Four, Case Number 38082, affirmed the judgment of the Superior Court of the State of California for the County of Alameda, against Petitioner and in favor of Respondent.

The jurisdiction of this Court is invoked under the provisions of 28 USC Section 1331.

QUESTION PRESENTED

Whether Petitioner was denied the right to a hearing due to a technicality, a denial of procedural due process as afforded by the Fourteenth Amendment of the Constitution of the United States.

The answer must be in the affirmative.

STATUTES INVOLVED

Constitution of the United States, Fourteenth Amendment, §1, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, or citizens of the United States and of the

state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT

This case involves the procedure to invoke an administrative hearing.

Petitioner was an employee-secretary of Peralta Community Colleges. On February 14, 1973, petitioner was dismissed for alleged failure to perform her duties and for unprofessional conduct. On February 16, 1973, the Vice Chancellor sent a letter to petitioner which included a statement that petitioner could request a hearing by returning an enclosed "postcard" by February 23, 1973. However, petitioner's attorney, instead of responding by a "postcard" as required by Calif. Educ. Code §13583, responded by a letter requesting for further specifications of charges made against her and a hearing as upon receipt of the same. The Appellate Court affirmed the trial court's decision granting a summary judgment by holding that even though petitioner filed for such a hearing within the required five day time period as specified in Calif. Educ. Code §13583, petitioner did not effectively request a hearing and failed

to substantially comply with the form of the request for a hearing, that is, a postcard without these additional specifications. (See page 6, of Exhibit A)

REASONS FOR GRANTING THIS WRIT

I. The Flexibility of Procedural Due Process will Defeat a Technicality.

II. *Board of Regents of State College* v. *Roth* (see Infra) Establishes Procedural Due Process Guarantees.

III. *Skelly* v. *State Personnel Board* (see Infra) Extends Procedural Due Process to Permanent Civil Service Employees.

IV. Administrative Hearings Disregard Technical Deficiencies to Uphold Due Process.

V. The Liberal Requirements in Filing a Notice of Appeal should likewise be Utilized to Interpret The Procedure to Invoke a Hearing Pursuant to Calif. Educ. Code §13583.

I.

THE FLEXIBILITY OF PROCEDURAL DUE PROCESS WILL DEFEAT A TECHNICALITY.

The Fourteenth Amendment of the United States Constitution and Article I Section 13, of the California Constitution states inter alia: "no state shall deprive any person of life, liberty, or property, without due process of law. . . ." Due Process requires two essential conditions:

1) The parties be given notice, and

2) An opportunity for hearing, before any order or judgment on the proceedings can be made by which they will be deprived of life, liberty, or property. *Datta* v. *Stabb* (1959) 173 CA 2d 615, 622. Furthermore, the propriety of the deprivation must be resolved in a manner consistent with essential fairness. *Gray* v. *Whitmore* (1971) 17 CA 3d 5, 21.

In the instant case, petitioner is concerned with the issue of the procedure to invoke the opportunity for an administrative hearing.

"It is a cardinal principal of due process that no one shall be bound or concluded by a judgment, either in respect to his person or his property, unless he has had his day in court." *Tay, Brooks, Backus* v. *Hawley* (1870) 39 Cal. 96; 13 Cal.Jur. 3d 667, 668. Hence, a person shall not be bound until he had been duly cited to appear and has been afforded an opportunity to be heard. *McClathy* v. *Superior Court* (1897) 119 Cal. 421. The right to a hearing is one of the rudiments of fair play assured by the due process clause and there can be no compromise when that minimal requirement has been neglected or ignored. *Endler* v. *Schutzbank* (1968) 68 Cal. 2d 164, 180.

In the present case, petitioner, for over a two year period, was an employee-secretary of Peralta Community Colleges. On February 14, 1973, petitioner was dismissed for alleged failure to perform her duties and for unprofessional conduct. On February 16, 1973, the Vice Chancellor sent a letter to petitioner which included a statement that petitioner could request a hearing by returning an enclosed "Postcard" by February 23, 1973.

However, instead of responding by a "*Postcard*" as required by Calif. Educ. Code §13583, petitioner's attorney responded by a personal letter, requested further specification of charges from the Chancellor as well as a hearing upon receipt of the specified charges. Nevertheless, the Supreme Court of California affirmed the Appellate and Superior Courts' decision by holding that even though petitioner filed for such a hearing within the required five day time period as specified in Calif. Educ. Code §13583[1], petitioner, by attaching the conditions to her demand for a hearing did not substantially comply with the form of the request for a hearing.

It is petitioner's contention that such a technicality *slaps* the conscience of judicial fairness. At most, *reasonable* conditions must be imposed as a

[1]Calif. Educ. Code §13583 states in part: "The governing board shall adopt rules of procedure for disciplinary proceeding which shall contain a provision for informing the employee by written notice of the specific charges against him, a statement of his right to a hearing on such charges, and the time within which such hearing may be requested which shall be not less than five days after service of the notice of the employee, and a card or paper, the signing of which shall constitute a demand for hearing, and a denial of all charges. The burden of proof shall remain with the governing board, and any rule or regulation to the contrary shall be void."

condition of a hearing. The requirements of due process are not met where the right of a hearing is granted only on conditions so *harsh* and *oppressive*, as here, where a request for a specification of charges and a request for a hearing once these specified charges have been received is construed as not an effective request for an administrative hearing. This is a denial of a fundamental right.

Charles v. *Board of Education* (1971) 20 CA 3d 85, 89 states: "Due process is not interested in mere technical formalism, it is the *substance* that is determinative of whether due process has been afforded, and the more important the rights at stake, the more important must be the procedural safeguards surrounding these rights." As in the petition before this court, this Honorable Court must look to the method of petitioner's request for a hearing.

II.

BOARD OF REGENTS OF STATE COLLEGES v. ROTH ESTABLISHES PROCEDURAL DUE PROCESS GUARANTEES.

The Board of Regents of State Colleges v. *Roth* (1972) 408 U.S. 564, 570, 571, held that procedural due process guarantees apply, by *assessing and balancing* the particular interests involved. "But, to determine whether due process requirements apply in the first place, we must not look to the 'weight' but to the nature of the interests at stake. We must look to

see if the interests is within the Fourteenth Amendment's protection of property and liberty." See Roth at page 571.

The United States Supreme Court has made it clear that the property interests protected by procedural due process extend well beyond actual ownership of real estates, chattels or money. In the present case, the termination of petitioner's job and her civil service position is the property interest that is protected by the due process clause.

Here, respondents declined to reinstate petitioner on grounds of unprofessional conduct (obscenity charges). In *Roth*, at page 573, (supra), the court goes on to say:

> "For [w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437. *Wieman* v. *Updegraff*, 344 U.S. 183, 191; *Joint Anti-Fascist Refugee Committee* v. *McGraff*, 341 U.S. 123; *United States* v. *Lovett* 328 U.S. 303, 316, 317; *Peters* v. *Hobby*, 349 U.S. 331, 352 (concurring opinion). See *Cafeteria Workers* v. *McClroy*, 367 U.S. 886, 898. In such a case, due process would accord an opportunity to refute the charge before University officials."

Said obscenity charges have seriously damaged petitioner's good name, reputation, honor and integ-

rity. Her dismissal by one college on those grounds creates concrete and practical diffculties for petitioner in that due to petitioner's tarnished record it would be difficult to obtain employment in another school district.

Thus, this Honorable court must balance the concepts and interests of the denial of property and liberty to the failure of exact compliance to demand a hearing without further specification of charges pursuant to Calif. Educ. Code §13583. Such a balancing must be weighed in favor of petitioner. Due process is not interested in mere *technical* formalism when more important rights are at stake, as in the case before this court.

III.

SKELLY v. STATE PERSONNEL BOARD EXTENDS PROCEDURAL DUE PROCESS TO PERMANENT CIVIL SERVICE EMPLOYEES.

Skelly v. *State Personnel Board*, (1975) 15 C3d 194 extends flexible due process safeguards from teachers to permanent civil service employees. *Skelly* (see Supra) was a case where a physician with the status of a permanent civil service employee was accorded a hearing before the State Personnel Board after receiving a written notice from the State Department of Health Care Services terminating his employment on grounds of intemperance and inexcusable absence. The Supreme Court held that the State statutory scheme regulating civil service em-

ployment confers upon a "permanent civil service employee" a property interest in continuation of his employment and that this interest is protected by due process.[1]

In the instant case for approximately two years, from March 10, 1971 to March 2, 1973, petitioner worked as a secretary for Peralta Colleges. Petitioner fits within the statutory scheme of a "permanent employee."

Thus, *Skelly* (see Supra) begins its extension of due process analysis by observing that the California statutory scheme regulating civil service employment by conferring upon an individual who achieves the status of "permanent employee," as the petitioner here, a property interest in the continuation of his employment which is protected by due process.

The *Skelly* court (see Supra) at p. 206, states: "where the United States Supreme Court made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels or money. Rather, [t]he Fourteenth Amendment procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms."

[1]Calif. Government Code Section 18528 provides: "Permanent employee" means an employee who has permanent status. "Permanent status" means the status of an employee who is lawfully retained in his position after the completion of the probationary period provided in this part and by board rule. The "probationary period" is the initial period of employment and generally lasts for six months unless the Board establishes a longer period not exceeding one year. (Calif. Gov. Code §19170.)

Moreover, the *Skelly* Court noted at page 207: "When a person has a legally enforceable right to receive a government benefit provided certain facts exist, this right constitutes a property interest protected by due process. (*Goldberg* v. *Kelly*, (1970) 397 US 254, 261-262); see *Geneva Towers Tenants Org.* v. *Federated Mortgage Inv.* (9th Cir. 1974) 504 F2d 483, 495-496 (Hufstedler, J. dissenting). Applying these principles, the high court has held that a teacher establishing 'the existence of rules and understandings, promulgated and fostered by state officials, that . . . justify his legitimate claim of entitlement to continued employment absent 'sufficient cause,' has a property interest in such continued employment within the purview of the due process clause.'"

Hence, state employees, as the petitioner, who attain permanent stature are accorded a substantially identical property rights as teachers.

IV.

ADMINISTRATIVE HEARINGS DISREGARD TECHNICAL DEFICIENCIES TO UPHOLD DUE PROCESS.

Administrative Law, written by Bernard Schwartz and Edwin D. Webb, Professor of Law of New York University School of Law, Little, Brown and Co., Boston, Toronto, 1976, pp. 271, 272, states that the outstanding feature about notice and pleading stages, under Federal Administrative Procedure Act (5USC Section 551) is their *unimportance*. "The test is one of fair notice; if it is met, possible deficiencies are

irrelevant." Supra 273. Furthermore, Judge Friendly states the flexible due process standard within this administrative law framework: "If due process is interpreted as a mechanical yardstick, unalterable regardless of time, place, and circumstances, it may make government unworkable . . ." (Supra p. 258).

Applying said principles to the instant case, if such unimportance is given to notice and pleading then likewise the same liberal approach should be extended to the manner in which the Petitioner tried to invoke a hearing pursuant to Calif. Education Code §13583. Here, petitioner's attorney requested a hearing with further specification of charges. This did not comport with exact requirements of Calif. Education Code §13583 (see supra). But if this Honorable Court observes this flexible standard, then this technical deficiency should be overlooked. Thus, by disregarding this principle of procedural due process, the California Supreme Court denied petitioner the right to exhaust her administrative remedies and, more importantly, the right to due process.

V.

THE LIBERAL REQUIREMENTS IN FILING A NOTICE OF APPEAL SHOULD BE UTILIZED TO INTERPRET THE PROCEDURE TO INVOKE A HEARING PURSUANT TO CALIF. ED. CODE §13583.

Nu-Way Associates, Inc. v. *Keefe* (1971) 15 CA3d 926, 928, specifies the general rule regarding the strict time requirement for taking an appeal. *Nu-Way Associates* (see supra at page 928) states:

> "In civil cases the time requirement for taking an appeal are mandatory, and appellate courts are without jurisdiction to consider late appeals. This rule is applicable even though notice of appeal is filed one day late."

Hence, Rule 1 of California Rules of Court relating to the District Court of Appeal states inter alia:

> "A notice of appeal shall be liberally construed in favor of its sufficiency."

Sharick v. *Galloway* (1936) 12 CA2d 733, 736 shows this liberal rule of construction by holding that "technical objections to the presentation of appeals are not favored, and in the absence of a showing of injury to some right of the adverse party, will not be sustained." This case held that an appeal was not to be invalidated by the fact that the Notice of Appeal incorrectly stated the date on which judgment appealed was rendered.

The *Estate of Wakefield* (1968) 258 CA2d p. 274, 275, held an omission or mistake in the title does not invalidate the notice to the action or proceeding.

In addition, *Mamer* v. *Superior Court* (1940) 15 C2d 569, 571, 572 held that a statement in the notice that a party "appeals," or "desires" or "intends" to appeal, is sufficient to transfer jurisdiction to the reviewing court.

In the instant case, Petitioner filed within the five day limitation to invoke a hearing as required by Calif. Education Code Section 13583. As seen on page six on the unpublished opinion of the Appellate Court (appended hereto as Exhibit "A") the court stated that Petitioner's attorney did state a "hearing is demanded in a letter," after the said charges have been set forth specifically.

Therefore, this liberal construction in filing a notice of appeal should be utilized by this Honorable Court to mitigate the strict method to invoke a hearing pursuant to Calif. Ed. Code Section 13583.

As has been shown above, the appellate court will liberally construe the method of filing the notice of appeal to partially mitigate these requirements. Thus, when a party inarticulately demands a hearing by not complying with the specific requirements to file a notice of appeal, the Appellate Court will try to preserve the parties procedural due process right by allowing said party to obtain appellate jurisdiction.

Moreover, as seen in *Mamer* v. *Superior Court* (see supra), even a statement in the notice that a party "desires" or "intends" an appeal is sufficient to transfer jurisdiction to the Appellate Court. Thus, transfer jurisdiction to the Appellate Court. Petitioner "intended" and "desired" a hearing by writing a letter demanding said hearing.

To avoid the harsh effects of denying Petitioner her procedural due process rights, this Honorable Court should adopt the California Legislature's liberal requirements in avoiding technical deficiencies in invoking an appeal. Moreover, this liberal construction will mitigate the strict method of compliance of Calif. Educ. Code Section 13583.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Dated: March 1, 1977.

Respectfully submitted,

Law Offices of

ROBERT C. BURNSTEIN
By: ROBERT C. BURNSTEIN
Counsel for Petitioner

STATE OF CALIFORNIA
COUNTY OF ALAMEDA } ss.

AFFIDAVIT OF SERVICE BY MAIL

I, SANFORD HOWARD RUDNICK, a law clerk in the law offices of Robert C. Burstein, attorneys of record for Ann Hernandez, Petitioner herein, deposes and says that on March 1, 1977, I served a copy of the foregoing of Petition for Writ of Certiorari on Donald Dye, et al., Respondents herein, by making a copy thereof, in a duly addressed envelope, with first class postage prepaid, to: Crosby, Heafey, Roach and May, attention of attorney Mr. Murphy, 1939 Harrison St., Oakland, Calif. 94612.

Sanford Howard Rudnick

Subscribed and sworn to before me on February 8, 1977.

Jayne E. Starks

Notary Public, in and for the County of Alameda, State of California.

APPENDIX

EXHIBIT A

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

Filed Sept. , 1976
Court of Appeal—First Appellate District
Clifford C. Porter, Clerk

ANN HERNANDEZ,
Plaintiff and Appellant,

VS.

DONALD DYE, et al.,
Defendants and Respondents.

1/Civil 38082
(Superior Court No. 433592)

Ann M. Hernandez appeals from a summary judgment dismissing her complaint against respondents Donald Dye, Felix Elizalde, Dr. Clement A. Long, Dr. Norvel Smith, Peralta Colleges, and Peralta Colleges Board of Trustees. In her complaint appellant sought reinstatement as an employee of Peralta Community College District, back pay, compensatory damages and punitive damages. We affirm the judgment.

Appellant was employed as a secretary in the Public Information Office at Merritt College, one campus of the Peralta Community College District. Her immediate supervisor was respondent Felix Elizalde who, as public information and publications officer at Merritt College, had among his responsibilities the duty

to investigate and to attempt to resolve personnel problems of employees under his supervision, and to communicate to his superiors those problems and any recommended discipline. On February 13, 1973, Elizalde requested that respondent Donald Dye arrange for appellant's removal from the public information office. Dye, as assistant dean for business services, had the responsibility for supervision of all classified personnel, including the duty of investigating personnel problems and recommending action to eliminate those problems. In discharging these duties, Dye communicated with the immediate supervisors of employees and with other persons charged with personnel responsibilities. On February 14, 1973, Dye requested of respondent Dr. Clement A. Long that appellant be dismissed for failure to perform her duties and for unprofessional conduct. Long, vice chancellor in charge of administration and business services for Peralta College District, was acting chancellor at that time. On February 16, 1973, he sent a letter to appellant notifying her that pursuant to Dye's request and with the approval of respondent Dr. Norvel Smith, President of Merritt College, her employment was terminated effective March 2, 1973. The letter stated reasons for the termination, and included a statement that appellant could request a hearing by returning an enclosed card by February 23.

On February 19, appellant requested an executive personnel session of the Peralta Board of Trus-

tees. On February 20, appellant's attorney sent a letter to Long stating: "If [appellant] cannot obtain such a meeting with the Board of Peralta District, a hearing is demanded on the charges enumerated in your letter of February 16, 1973, after the said charges have been set forth specifically in order that [appellant] may be in a position to properly defend herself."

Appellant's employment was terminated without a hearing, on the basis that she had not requested a hearing.

Appellant contends that the summary judgment was improperly granted. Summary judgment is proper only where there is no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., §437c; *Stationers Corp.* v. *Dun & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 417.)

The complaint contained three causes of action. The first cause of action prayed for compensatory and exemplary damages against Dye and Elizalde for allegedly acting in collusion and embarking on a course of conduct "designed to harass, intimidate, undermine the relationship of [appellant] with students and to belittle [appellant] and to compile a record of false accusations, charges and intimations of improper conduct, all of which conduct on the part of said [respondents] was designed principally to

compel [appellant] to resign or transfer to some other department" and that this alleged conduct was carried out by the means of written memoranda employing false statements about appellant. The cause of action further alleges that this conduct was the proximate cause of embarrassment, humiliation, extreme anxiety, emotional trauma, and physical illness to appellant. Thus, the complaint apparently attempts to recite, by this first cause of action, a cause of action for either intentional infliction of emotional distress or libel against respondents Elizalde and Dye.

"Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." (Gov. Code, §820.2.) The distinction between a "discretionary" act, the performance of which will not subject a public employee to liability, and a "ministerial" act, which is not so protected, depends upon "policy considerations relevant to the purpose of granting immunity to the governmental agency whose employees act in discretionary capacities." (*Johnson* v. *State of California* (1968) 69 Cal.2d 782, 787-790; *Lipman* v. *Brisbane Elementary Sch. Dist.* (1961) 55 Cal.2d 224, 230.) These policy considerations include "the importance to the public function involved, the extent to which governmental liability might impair free exercise of the function, and the availability to

individuals affected of remedies other than tort suits for damages." (*Johnson*, *supra*, 69 Cal.2d at p. 789, quoting *Lipman*, *supra*, 55 Cal.2d at p. 230.)

In the present case, it is undisputed that in their exercise of their responsibilities as school officials both Elizalde and Dye were required to supervise personnel. To fulfill this responsibility, Elizalde and Dye were required to communicate with each other and with appellant and other school district employees and officials for both the purpose of observing appellant's performance in her employment and for the purpose of recommending what action, if any, was to be taken. The importance to the public of maintaining an efficient and harmonious administration of educational functions is obvious. Moreover, it is evident that were liability to be imposed upon school employees for the exercise of their supervisorial functions, those functions would be disrupted. "The subjection of officials, the innocent as well as the guilty, to the burden of a trial and to the danger of its outcome would impair their zeal in the performance of their functions, and it is better to leave the injury unredressed than to subject honest officials to the constant threat of retaliation." (*Lipman* v. *Brisbane Elementary School Dist.*, *supra*, 55 Cal.2d at p. 229; *Tietz* v. *Los Angeles Unified School Dist.* (1965) 238 Cal.App.2d 905, 910.) Moreover, an available remedy exists by which classified employees may obtain a hearing and review of any discipline, including term-

ination, prior to its imposition and thus obtain redress short of a tort suit for damages where they have been improperly disciplined. (See Ed. Code, §13583.) Thus, respondents Elizalde and Dye were acting in a discretionary capacity causally related to appellant's claimed injury; they were immune from liability for their actions with regard to appellant. (*McCorkle* v. *City of Los Angeles* (1969) 70 Cal.2d 252, 262.) The court properly determined that there was no triable issue of fact as to the personal liability of Elizalde and Dye.

The second cause of action alleges that Clement A. Long, the acting chancellor of the Peralta College District, at the request of Dye and with the approval of Dr. Norvel Smith, the president of Merritt College, terminated appellant's employment without a hearing or prior notice, thus denying appellant procedural due process and also causing her to suffer emotional and physical injury. Appellant claimed that her damages as a result of this conduct were $50,000, and appellant also requested exemplary damages of $500,000. A permanent employee is subject to disciplinary action only for cause; the employee must be informed by written notice of the specific charges against him and of his right to request a hearing upon the charges. (Ed. Code, §13583.) The termination letter to appellant included a statement of the charges against her and that her employment was to be terminated. The letter also stated that she could deny the charges at

a specific time prior to the effective date of the termination; a postcard was provided for denying the charges and requesting a hearing as required by the applicable statute (Ed. Code, §13583). The letter sent by appellant's attorney did state "a hearing is demanded on the charges enumerated in your letter of February 16, 1973, *after the said charges have been set forth specifically*" (emphasis added). But there was no requirement of a further specification of charges, and the condition which the letter attached to the demand was never met; thus there was no effective request for a hearing under Education Code section 13583. Appellant's failure to avail herself of the statutory hearing procedure vitiates her due process claim and her claim to recover wages.

The second cause of action sought damages, but there is nothing in the declarations to support appellant's assertion of having suffered the claimed emotional and physical injuries as a result of her termination. It was proper to grant summary judgment as to the second cause of action. (See *Balen* v. *Peralta Junior College Dist.* (1974) 11 Cal.3d 821, n. 2 at p. 826.)

The third cause of action alleges that respondents Smith and the board of trustees of Peralta Colleges (1) failed to take action to protect appellant's rights, and (2) permitted the termination of appellant's employment without complying with procedural due process. No authority is cited which would permit

an award of damages against either Smith or the board of trustees for failure to protect appellant's rights from any infringement by Dye or Elizalde.

The judgment is affirmed.

Christian, J.

We concur:
Caldecott, P. J.
Emerson, J.*

*Retired judge of the Superior Court sitting under appointment by the Chairman of the Judicial Council.

EXHIBIT B

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

NOV 12 1976

I have this day filed Order

HEARING DENIED

In re: 1 Civ. *No.* 38,082
Hernandez

vs.
Dye, et al.

Respectfully,

G. E. BISHEL
Clerk

42536-077 8-76 3M OSP

Supreme Court, U.S.
FILED
MAR 3 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-1216

ANN HERNANDEZ, *Petitioner,*

vs.

DONALD DYE, et al., *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No.

ANN HERNANDEZ, *Petitioner,*

vs.

DONALD DYE, et al., *Respondents.*

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

I. OPINIONS BELOW[1]

The decision about which petitioner complains is an unpublished opinion of the California Court of Appeal which may not be cited in any other case (Cal. Rules of Court, Rule 977). A hearing was denied by the California Supreme Court, but that denial was not a decision on the merits of the case. *DiGenova v. State Board of Education,* 57 Cal.2d 167, 178, 18 Cal.Rptr. 369, 367 P.2d 865 (1962).

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[1]Since petitioner has not adequately and correctly complied with Rule 23, and in an effort to aid the court, this brief in opposition adopts the format of a petition to supplement or correct information supplied by petitioner.

II. JURISDICTION

The opinion of the Court of Appeal was filed September 13, 1976, and became final on October 13, 1976. The California Supreme Court denied a hearing on November 12, 1976. The instant petition for certiorari was served on respondents by mail on February 8, 1977. Petitioner has not complied with Rule 21(3) with respect to advising respondents of the date this petition was filed.

Although petitioner is incorrect that this court has jurisdiction under 28 U.S.C. §1331, jurisdiction would be present under 42 U.S.C. §1257(3) except that the federal question presented is frivolous.

Petitioner has now filed an action in the Federal District Court for the Northern District of California based on the same facts as the instant case and entitled *Ann M. Hernandez v. Donald Dye, Felix Elizalde, Dr. Clement A. Long, Dr. Norvel Smith, Peralta Colleges, Peralta College Board of Trustees, Does I-X,* Action No. C-76-2921-RHS. The court may take judicial notice of that action.

III. QUESTION PRESENTED

There are no important constitutional issues in this case. Petitioner devotes most of her argument to the already well-established principle that public employees have a right to a hearing before termination. Respondents have never contested that principle and the California Education Code so provides.

The only issue presented is one of waiver and exhaustion of administrative remedies. That is, where petitioner attempted to avoid the established administrative hearing procedure provided, requested instead a hearing before another body, and then filed suit claiming denial of a hearing while that request was being considered, may that suit be dismissed?

IV. STATUTES

California Education Code §13583:

> The governing board of a school district shall prescribe written rules and regulations, governing the personnel management of the classified service, which shall be printed and made available to employees in the classified service, the public, and those concerned with the administration of this section, whereby such employees are designated as permanent employees of the district after serving a prescribed period of probation which shall not exceed one year.
>
> Any employee designated as a permanent employee shall be subject to disciplinary action only for cause as prescribed by rule or regulation of the governing board, but the governing board's determination of the sufficiency of the cause for disciplinary action shall be conclusive.
>
> The governing board shall adopt rules of procedure for disciplinary proceedings which shall contain a provision for informing the employee by written notice of the specific charges against him, a statement of his right to a hearing on such charges, and the time within which such hearing

may be requested which shall be not less than five days after service of the notice to the employee, and a card or paper, the signing and filing of which shall constitute a demand for hearing, and a denial of all charges. The burden of proof shall remain with the governing board, and any rule or regulation to the contrary shall be void.

No disciplinary action shall be taken for any cause which arose prior to the employee's becoming permanent, nor for any cause which arose more than two years preceding the date of the filing of the notice of cause unless such cause was concealed or not disclosed by such employee when it could be reasonably assumed that the employee should have disclosed the facts to the employing district.

This section shall apply only to districts not incorporating the merit system as outlined in Article 5 (commencing with Section 13701) of this chapter.

California Education Code §13583.5:

A notice of disciplinary action shall contain a statement in ordinary and concise language of the specific acts and omissions upon which the disciplinary action is based, a statement of the cause for the action taken and, if it is claimed that an employee has violated a rule or regulation of the public school employer, such rule or regulation shall be set forth in said notice.

A notice of disciplinary action stating one or more causes or grounds for disciplinary action established by any rule, regulation, or statute in the language of the rule, regulation, or statute, is insufficient for any purpose.

A proceeding may be brought by, or on behalf of, the employee to restrain any further proceedings under any notice of disciplinary action violative of this provision.

This section shall apply to proceedings conducted under the provisions of Article 5 (commencing with Section 13701) of this chapter.

V. STATEMENT OF FACTS

After numerous meetings with supervisors failed to result in improvement of petitioner's employment deficiencies (CT 560:29-561:8; 199; 562; 566; 205; 206; 212; 568; 569; 216; 571), and after petitioner retained an attorney to threaten her supervisors (CT 362; 366; 369; 372), petitioner was notified in writing on February 16, 1973, that she was terminated effective March 2, 1973 (CT 585).

This notification gave seven specific reasons for the termination[2] and advised petitioner of her rights to review her personnel file, deny the charges, and request a hearing before the personnel review committee.

Instead of requesting such a hearing, petitioner requested that an executive personnel session of the Board of Trustees be convened on March 5 or March 19 to hear her story (CT 587). Petitioner's attorney

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[2]These do not include obscenity, contrary to petitioner's assertion at pages 8 and 9 of her petition.

also made that request and stated that if such a session could not be arranged, a hearing was demanded "after the said charges have been set forth specifically" (CT 589).

On March 5, petitioner was advised that her request for an executive personnel session with the Board had been transmitted to that body for consideration (CT 592).

However, on March 8, eleven days before the March 19 date suggested by petitioner for such a session, petitioner filed the instant lawsuit (CT 1-6). Named as defendants were her supervisors, the District and the Board of Trustees.

On March 14, petitioner was advised that since she had filed suit, her request for an executive session with the Board was deemed inappropriate (CT 593).

VI. ARGUMENT

Petitioner misstates both the issue and the evidence in this case. The record shows that petitioner was offered a hearing pursuant to Education Code §§13583, 13583.5 (CT 586). Instead of accepting that hearing, she requested a special meeting of the Board of Trustees to discuss her case (CT 587). While the defendants were arranging the Board of Trustees' executive session requested by petitioner and her attorney, petitioner filed the instant lawsuit (compare CT 592, and 1). Because the suit had been filed, the request for a Board meeting was denied (CT 593).

Petitioner should not now be heard to complain that she did not get the hearing which she prevented by filing this lawsuit. The question presented is not whether petitioner was denied due process rights by a technicality, as she would have this court believe, but whether she waived her right to a hearing by making unreasonable demands for special treatment and then filing suit while those demands were under consideration. *See, Bignall v. North Idaho College,* 538 F.2d 243 (9th Cir. 1976).[3]

Indeed, if for no other reason her suit was properly dismissed for failure to exhaust her administrative remedies before filing her lawsuit. *Toney v. Reagan,* 467 F.2d 953 (9th Cir. 1972), *cert. denied,* 409 U.S. 1130 (1973).

VII. CONCLUSION

Petitioner has no one but herself and her attorneys to blame for her troubles. Instead of accepting the offered hearing, she demanded special treatment and imposed unjustified conditions on her acceptance of a hearing. Then while the District was trying to accommodate her, she filed this action.

The action was properly dismissed on motion for summary judgment. But in any event, there are no

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[3]Although petitioner does not assert that she was dismissed for constitutionally impermissible reasons, and has not relied on 42 U.S.C. §1983 in this proceeding, the reasoning of the court in *Bignall* would also require dismissal of the instant case.

questions here of constitutional importance and no federal laws are at issue. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondents.

Dated, February 28, 1977.